

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

DIVERSE MEDICAL MANAGEMENT, INC.;
AZZAM MEDICAL SERVICES, LLC,

Plaintiffs,

v.

Case No: 19-CV-00046

PLATINUM GROUP USA, INC.;
AMER RUSTOM;
THE THIRD FRIDAY TOTAL RETURN FUND, L.P.;
MICHAEL LEWITT;
AMERICORE HEALTH, LLC; GRANT WHITE; AND
JAMES B. BIDEN,

Defendants.

PLATINUM GROUP USA, INC.;
THE THIRD FRIDAY TOTAL RETURN FUND., L.P.,

Counterclaim Plaintiffs,

v.

DIVERSE MEDICAL MANAGEMENT, INC.;
MICHAEL FREY;
NATALIE FREY; AND
MOHANNAD AZZAM,

Counterclaim Defendants.

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO
ENJOIN DEFENDANT THE THIRD FRIDAY TOTAL RETURN FUND, L.P. FROM
PROCEEDING IN A LAWSUIT IN THE SOUTHERN DISTRICT OF FLORIDA**

Defendants Platinum Group USA, Inc. ("The Platinum Group USA"), Amer Rustom ("Rustom"), The Third Friday Total Return Fund, L.P. ("Third Friday Fund"), Michael Lewitt ("Lewitt"), and James B. Biden ("Biden") (collectively "Defendants"), by and through their

attorneys, respectfully submit their Response in Opposition to Plaintiffs’ Motion to Enjoin Defendant Third Friday Fund from proceeding in its lawsuit currently removed to the United States District Court for the Southern District of Florida. As noted in Defendants’ Answer (Dkt. 28, ¶ 10), there is not complete diversity between the Plaintiffs and Defendants in this case. That same defect also exists in the lawsuit in the Southern District of Florida that Plaintiffs seek to enjoin. Because this lack of diversity means that neither this Court nor the Southern District of Florida has subject matter jurisdiction over the claims made in the respective lawsuits, enjoining the lawsuit in Florida would be inappropriate. As such, this Court should deny Plaintiffs’ Motion to Enjoin.

I. Background

On June 20, 2019, Diverse Medical Management, Inc. (“DMM”) and Azzam Medical Services, LLC (“AMS”) filed a Complaint in this Court against The Platinum Group USA, Third Friday Fund, and Americore Health, LLC, alleging that those defendants had somehow misled DMM and AMS in an attempt to gain an advantage over Plaintiffs, though the complaint fails to articulate a coherent scheme. Although summonses were issued (Dkt. # 2), Plaintiffs did not serve their Complaint. As DMM well knew at the time of this filing, Third Friday Fund was weighing its own options to protect its interests – specifically, to recoup loans of more than \$750,000 that had been in default for several months. On July 19, 2019, Third Friday Fund filed a Complaint against DMM in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the “Palm Beach County action”), to enforce those loans. That lawsuit was filed in Florida as required by forum selection clauses agreed upon by the parties and contained in written loan agreements.¹

¹ See Dkt. # 28-1 ¶ 17. Plaintiffs’ contention that these clauses are void – based on unsupported allegations that “Third Friday Fund’s goal in inserting the provisions was to fraudulently use the

Third Friday Fund's Complaint in the Palm Beach County action alleges three counts against DMM: breach of contract, action for money had and received, and unjust enrichment, all arising from damages Third Friday Fund incurred from DMM's breach of documented loan agreements and failure to repay several loans that Third Friday Fund extended to DMM. Third Friday Fund seeks damages in that lawsuit in excess of \$766,465 for the aggregate amount of all of DMM's outstanding indebtedness, attorneys' fees and other costs.

After the filing of the Complaint in the Palm Beach County action, on July 22, 2019, Plaintiffs filed an Amended Complaint in the case at bar, adding three individuals as defendants, with allegations that reached many of the same issues of fact and law that were referenced in the jurisdictional statement in the Palm Beach County action. In this Amended Complaint Plaintiffs alleged that complete diversity existed between the parties, but this allegation was incorrect because Third Friday Fund is not diverse to Plaintiffs as certain of Third Friday Fund's limited partners are citizens of Tennessee.

Mirroring the claim of diversity made in the Amended Complaint, on August 13, 2019, DMM filed a Notice of Removal of the Palm Beach County action in the District Court for the Southern District of Florida, again incorrectly alleging complete diversity of citizenship. Plaintiffs now attempt to use that improper removal to a court lacking subject matter jurisdiction as the genesis for their motion before this Court to enjoin Third Friday Fund's lawsuit in Florida.

II. Lack of Diversity Between Third Friday Fund and DMM Renders the Motion to Enjoin Fatally Flawed

It was and is Plaintiffs' burden to establish that complete diversity exists here and in Florida, both because they filed the instant action in federal court and because, in a removal, the

forum selection clause as a cudgel . . ." – is meritless. It is also irrelevant to the issue of whether the Southern District of Florida (or this Court) has subject matter jurisdiction.

party “seeking to bring a case into federal court carries the burden of establishing diversity jurisdiction.” *Coyne ex rel. Ohio v. American Tobacco Co.*, 183 F.3d 488, 492-93 (6th Cir. 1999). *See also V&M Star, LP v. Centimark Corp.*, 596 F.3d 354, 357 (6th Cir. 2010) (holding that an amended complaint that named a limited partnership’s partners but failed to explain those partners’ citizenship was “fatally incomplete.”).

There is no dispute that DMM is a citizen of Tennessee for purposes of determining diversity. DMM is a Tennessee corporation organized and existing under the laws of Tennessee with its principal place of business in McMinnville, Tennessee. *See* Dkt. # 8 (Amended Complaint) ¶ 3; *See also Am. Motorists Ins. Co. v. Am. Emp. Ins. Co.*, 600 F.2d 15, 16 n.1 (5th Cir. 1979) (citing 28 U.S.C. § 1332(c)) (“For purposes of determining diversity of citizenship a corporation is deemed “a citizen of any State by which it has been incorporated and of the State where it has its principal place of business....”).

With respect to a limited partnership, however, the existence of diversity is determined not only by the principal place of business of the entity, but by the citizenship of every partner. *Hooper v. Wolfe*, 396 F.3d 744, 748 (6th Cir. 2005) (“For purposes of determining diversity jurisdiction, a limited partnership is deemed to be a citizen of every state where its general *and* limited partners reside.” (citations omitted) (emphasis in original)).

Here, Plaintiffs incorrectly allege that Third Friday Fund is completely diverse from Plaintiffs. Contrary to this assertion, certain of Third Friday Fund’s limited partners are citizens of Tennessee, and Third Friday Fund has had (and continues to have) Tennessee limited partners for many years before the actions at issue in this litigation arose. *See* Exhibit A (Declaration of Michael Lewitt).

The Tennessee citizenship of certain of the limited partners destroys diversity both in the improperly removed Palm Beach County action and in the instant action. “For a federal court to exercise subject matter jurisdiction under 28 U.S.C. § 1332, there must be complete diversity of citizenship among the parties, meaning “no plaintiff and no defendant are citizens of the same state.”” *Priester v. Bent Creek Golf Club, LLC*, 3:17-CV-284, 2018 WL 2305703, at *2 (E.D. Tenn. May 21, 2018) (quoting *Curry v. U.S. Bulk Transport, Inc.*, 462 F.3d 536, 540 (6th Cir. 2006)).

Plaintiffs have not met their burden in establishing subject matter jurisdiction either in the case before this Court or in the improperly removed Palm Beach County action. Although Plaintiffs make much of the first to file doctrine in their Memorandum in Support of their Motion to Enjoin, Third Friday Fund is the party to have filed (in Florida) the first (and only) action for which there is jurisdiction over the operative claims. For this reason, Defendants not only are requesting that this Motion be denied but will also move in the District Court for the Southern District of Florida for a remand of the Palm Beach County action back to state court.

III. Conclusion

Because Plaintiffs have not met – and cannot meet – their burden to establish subject matter jurisdiction in either this action or the improperly removed Palm Beach County action, the Motion to Enjoin Third Friday Fund from proceeding in the District Court for the Southern District of Florida should be denied.

Dated September 6, 2019

Respectfully submitted,

Defendants Platinum Group USA, Inc., Amer Rustom; The Third Friday Total Return Fund, L.P., Michael Lewitt, and James B. Biden and Counterclaim Plaintiffs The Platinum Group USA, Inc. and Third Friday Total Return Fund, L.P.

By: /s/ L. Webb Campbell

One of their attorneys

SHERARD ROE VOIGT HARBISON, PLC

J. Scott Hickman (BPR No. 017407)

L. Webb Campbell (BPR No. 011238) (Admitted
Pro Hac Vice)

150 3rd Ave. South, Suite 1100

Nashville, TN 37201

T: (615) 742-4200

F: (615) 742-4539

SHickman@srvhlaw.com

WCampbell@srvhlaw.com

--and--

FAEGRE BAKER DANIELS LLP

George R. Mesires (admitted *Pro Hac Vice*)

Yasmin N. Best (admitted *Pro Hac Vice*)

Joan A. Akalaonu (admitted *Pro Hac Vice*)

311 S. Wacker Drive, Suite 4300

Chicago, IL 60606

T: (312) 212 6500

F: (312) 212 6501

George.Mesires@faegreBD.com

Yasmin.Best@faegreBD.com

Joan.Akalaonu@faegreBD.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ENJOIN DEFENDANT THE THIRD FRIDAY TOTAL REFUND, L.P., FROM PROCEEDING IN A LATER FILED LAWSUIT IN THE SOUTHERN DISTRICT OF FLORIDA** was served upon Plaintiffs' counsel by the Court's CM/ECF filing system on the 6th day of September, 2019.

Robert A. Peal
Mark W. Lenihan
SIMS|FUNK, PLC
3322 West End Avenue, Suite #200
Nashville, TN 37203
(615) 292-9335
rpeal@simsfunk.com
mlenihan@simsfunk.com

and via regular mail, postage prepaid to:

Grant White
4337 Sea Grape Drive
Lauderdale-By-The-Sea, FL 33308

/s/ L. Webb Campbell

Attorney for Defendants Platinum Group USA, Inc.
Amer Rustom, The Third Friday Total Return Fund,
L.P., Michael Lewitt, James B. Biden and
Counterclaim Plaintiffs The Platinum Group USA,
Inc. and Third Friday Total Return Fund, L.P.